STATE OF NORTH CAROLINA

COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
20 CVS 12925

COASTAL CONSERVATION ASSOCIATION, d/b/a CCA NORTH CAROLINA et al.,

Plaintiffs,

v.

STATE OF NORTH CAROLINA,

Defendant.

DEFENDANT'S REPLY IN SUPPORT OF MOTION TO DISMISS

The defendant—the State of North Carolina ("State")—submits that, for the following reasons and those previously set forth in its brief in support of its motion to dismiss, the plaintiffs' opposition to the State's Motion to Dismiss lacks merit and the Complaint should be dismissed.

INTRODUCTION

The plaintiffs allege that their rights under two separate constitutional provisions have been abridged. As detailed below, the plaintiffs' position fails on a number of levels. For example, the courts of this State have never adopted the U.S. Supreme Court's non-binding statements regarding the public trust doctrine, and even if they had, those statements were never then adopted into the state's Constitution. Accordingly, the plaintiffs' claims lack any basis in North Carolina law.

More fundamentally, however, the plaintiffs' grievance in this case is one of policy and not law. In making their case, the plaintiffs attempt to paint the State as disclaiming any responsibility for protecting its natural resources, alleging the State's regulatory agency is run by the commercial fishing industry. The Court does not need to address these inflammatory policy-related assertions in order to resolve the State's motion to dismiss. However, before responding

to the plaintiffs' novel legal arguments, the State will respond to these baseless assertions to avoid any misperception that it has acquiesced to them.

First, the plaintiffs' claims in essence boil down to a policy disagreement. Although North Carolina has not outright banned commercial gillnet fishing and trawling, it has promulgated numerous rules placing restrictions on commercial fishing, some of which pertain to gillnet fishing and trawling. See 15A N.C. Admin. Code ch. 03. There are also a number of current proclamations by the State Fisheries Director placing additional restrictions on commercial fishing.[1] Proclamations are public notices with the force of law that suspend or implement rules affected by variable conditions. See 15A N.C. Admin. Code 03H .0103. The State's argument that the plaintiffs do not have a common law or constitutional cause of action to challenge marine fisheries policy does not mean the State is arguing that the preservation of its marine fisheries resources is not important or that there is no avenue open to the plaintiffs for redress.

The plaintiffs seem to suggest that because they have allegedly been injured, there must be a cause of action to remedy said alleged injury. E.g., Pls.' Br. 29. However, individuals can only bring forth constitutional claims against the State if the alleged injury is one to a constitutional right. See Corum v. Univ. of N.C., 330 N.C. 761, 782, 413 S.E.2d 276, 289 (1992) ("In the absence of an adequate state remedy, one whose state constitutional rights have been abridged has a direct claim against the State under our Constitution." (emphasis added)). As explained below, the plaintiffs have not alleged facts establishing an injury to a constitutional right. The legislative and executive branches make policy decisions on a regular basis that impact the interests of various constituencies. These competing interests are not necessarily

[1] Proclamations are collected here: http://portal.ncdenr.org/web/mf/proclamations-current

protected by rights in the Constitution, and the fact that one's interest is negatively affected does not necessarily give rise to a cause of action.

If the plaintiffs do not agree with the State's marine fisheries policies they can, as with most policy disagreements, attempt to convince the legislative and executive branches to change those policies through advocacy and at the ballot box. Indeed, there is currently a bill in the General Assembly which, if enacted, would ban commercial gillnetting in coastal waters. H. 513, 1st ed., Gen. Assemb. (Apr. 12, 2021).

Second, the plaintiffs assert in their Complaint, and again in their brief, "regulatory capture" of the State's marine fisheries policymaking by the commercial fishing industry. Compl. ¶¶ 10, 40, 125–26, 177–78, 183, 227, 278; Pls.' Br. 22. These allegations are beside the point. There is no cause of action for alleged "regulatory capture." Nevertheless, the State again responds briefly to these allegations to avoid any misperception that it accepts this characterization.

The North Carolina Marine Fisheries Commission ("MFC") is charged with promulgating regulations regarding the state's marine fisheries. N.C. Gen. Stat. § 143B-289.51. The MFC consists of nine members appointed by the Governor. Three of the members are from the commercial fishing and seafood industry and an equal number are drawn from recreational and sport fishing interests. Id. § 143-289.54. As discussed above, the State has promulgated numerous rules and has issued a number of proclamations placing restrictions on commercial fishing. Representatives of the commercial fishing industry have in fact sued the State on numerous occasions. See, e.g., N.C. Fisheries Ass'n, Inc. v. N.C. Dept. of Envtl. Quality, 16 CVS 945 (N.C. Super. Ct. Carteret Cnty.) (challenging management measures adopted by the MFC on the commercial southern flounder fishery); N.C. Fisheries Ass'n Inc v. Pritzker, 4:14-cv-138-D (E.D.N.C.) (alleging that the State's regulations regarding recreational hook and line

fishing violate the federal endangered species act); N.C. Fisheries Ass'n Inc. v. N.C. Marine Fisheries Comm'n, 18 CVS 336 (N.C. Super. Ct. Carteret Cnty.) (alleging that the MFC violated the State's open meeting laws). None of this speaks of a policy body beholden to the commercial fishing industry. Regardless, this remains a policy dispute that lacks constitutional dimension. The plaintiffs' remedy is still at the ballot box and through any other proper avenues, not with this Court in this action.

ARGUMENT

The plaintiffs' claim that their constitutional rights have been violated rests on two key steps: First, they contend that the courts of this state have adopted the U.S. Supreme Court's statement of the law of the public trust doctrine. Second, they aver that this adopted standard has been merged into the State Constitution. They are wrong on both counts.

The U.S. Supreme Court has been clear that the public trust doctrine is state law and therefore that Court's pronouncements regarding the doctrine do not control the states. In turn, not only have the North Carolina courts not adopted the U.S. Supreme Court's version of the public trust doctrine, the North Carolina Supreme Court has flatly rejected a main holding from Illinois Central. Therefore, the State is not bound by any duties or legal standards set forth in, for example, Illinois Central.

Even if the state's public trust doctrine did incorporate the U.S. Supreme Court's version of the doctrine, the State never constitutionalized that law. Neither of the constitutional provisions cited by the plaintiffs ever mentions the public trust doctrine. In fact, the drafters considered and rejected both characterizing state resources as a "trust" and mandating action by the State regarding such resources. Instead, the Constitution creates a statewide "policy" and "proper function" and provides individuals with certain rights that apply throughout the State, not just on trust properties. Consequently, and unsurprisingly, when the North Carolina Supreme

Court addressed whether the public trust doctrine could control state action, it concluded that it could not because there is an "absence of a constitutional basis for the public trust doctrine." Gwathmey v. State ex rel. Dep't of Env't, Health & Nat. Res., 342 N.C. 287, 304, 464 S.E.2d 674, 684 (1995). Because the public trust doctrine is only a common law doctrine, sovereign immunity bars any claims against the State.

For these and other reasons, the plaintiffs' claim necessarily fails as a matter of law.

I. THE PLAINTIFFS' SOVEREIGN IMMUNITY ARGUMENT ATTACKS A STRAWMAN.

Contrary to the plaintiffs' argument on pages 7–10 of their brief, the State does not argue that it has sovereign immunity from constitutional claims. The State previously stated in its brief in support of its motion to dismiss that it "reads the Complaint as alleging one claim under the public trust doctrine, and citing the constitutional provisions as support for that claim." State's Br. 5. Thus, the State explicitly stated that its "sovereign immunity argument is limited to the plaintiffs' claim for relief under the common law public trust doctrine," as distinguished from any "separate claims under the Constitution." Id. at 5 n.1 (emphasis added). "[O]ut of an abundance of caution," the State then showed in section II of its brief in support of its motion to dismiss that the plaintiffs cannot state a claim under the Constitution either, but the State never asserted sovereign immunity in that context. Id. at 5, 15–20.

The plaintiffs undoubtedly have alleged and seek to prove that the State is violating the public trust doctrine. But they cannot simply bring a claim under the common law public trust doctrine because sovereign immunity would bar such a claim—a conclusion that the plaintiffs have not contested.

The plaintiffs cannot circumvent this critical jurisdictional defect by arguing that the state Constitution has incorporated the common law public trust doctrine. As explained in detail

below, the Constitution has not adopted the common law public trust doctrine. Moreover, neither the common law public trust doctrine, standing alone, nor the Constitution, on its own, created rights that allow the plaintiffs to bring forth their claim that the State's marine fisheries laws and policies do not sufficiently regulate the commercial fishing industry.

II. THE PUBLIC TRUST DOCTRINE HAS NOT BEEN CODIFIED IN THE NORTH CAROLINA CONSTITUTION, AND EVEN IF IT HAD BEEN, IT WOULD NOT OBLIGATE THE STATE TO REGULATE COMMERCIAL FISHING AS THE PLAINTIFFS PREFER.

The plaintiffs contend that the Constitution "ratified," "codified" and "incorporated" the public trust doctrine. Compl. ¶¶ 1, 98 n.9, 185; Pls.' Br. 2, 3, 7, 27, 32. They are wrong. And even if they were correct, the public trust doctrine does not create the right that they seek to enforce in this case.

A. The text and history of the North Carolina Constitution, as well as its legislative implementation and judicial interpretation, all point to the same conclusion: the amendments were not intended to, and did not, constitutionalize the public trust doctrine.

"Constitutional interpretation begins with the plain language as it appears in the text." N.C. State Bd. of Educ. v. State, 371 N.C. 149, 159, 814 S.E.2d 54, 61 (2018). Aside from setting forth the partial text of article I, section 38 and article XIV, section 5, and italicizing certain words, the plaintiffs never advance any cogent explanation as to how the plain text of these provisions ratifies, codifies or incorporates the set of legal principles known as the public trust doctrine.

What is immediately apparent form the text is that neither of these constitutional provisions mentions the public trust doctrine or even any type of trust. This was no accident. As the plaintiffs have observed, public trust principles have been the law in North Carolina for centuries. Pls.' Br. 16; see also, e.g., Shepard's Point Land Co. v. Atl. Hotel, 132 N.C. 517, 525, 44 S.E. 39, 41 (1903) (discussing lands "held in trust for the use of all of the citizens"). "The

Legislature is presumed to know the existing law and to legislate with reference to it." State v. Elmore, 224 N.C. App. 331, 334, 736 S.E.2d 568, 569 (2012) (quoting State v. Southern R. Co., 145 N.C. 495, 542, 59 S.E. 570, 587 (1907)). If the General Assembly intended that the people codify the public trust doctrine in the Constitution, it could have mentioned that very doctrine in its proposed amendment, but it did not.

Instead, the text of article XIV, section 5 speaks of a "policy" and "function" to "preserve" certain natural resources as part of the State's "common heritage." Article I, section 38, "forever preserve[s]" certain "right[s] of the people" to, among other things, "fish." Although these constitutional provisions, at least to some extent, relate to the same subject matter as the public trust doctrine, neither evidences any intent to make binding the discrete legal principles of the public trust doctrine.

Further, the public trust doctrine is limited to navigable waters and certain lands directly associated with them. E.g., Nies v. Town of Emerald Isle, 244 N.C. App. 81, 87–94, 780 S.E.2d 187, 193–97 (2015) (holding that the public enjoys public trust rights in the ocean and the immediately adjacent dry sand area). But both of the constitutional provisions that the plaintiffs tout cover resources that exist and activities that may occur not only in navigable waters but throughout the state. This Court should read these constitutional provisions for what they are: certain policies and rights that prevail throughout the state—nothing more and nothing less—and not any effort to constitutionalize the public trust doctrine by implication.

The history of article XIV, section 5 confirms this. The very first sentence of the first bill that was introduced in the General Assembly to enact article XIV, section 5 read: "The policy of the State shall be to conserve and protect its natural resources, environment, scenic beauty and all lands, waters and other resources which are held in trust for the people of the State." S. 96, 1st

ed., Gen. Assemb. (Feb. 2, 1971).[2] Even if this "trust" language was intended to refer to the public trust doctrine[3], it did not survive to the adopted constitutional amendment. As our state courts have indicated, "[f]ew principles of statutory construction are more compelling than the proposition that [the legislature] does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language." McCracken & Amick, Inc. v. Perdue, 201 N.C. App. 480, 489, 687 S.E.2d 690, 696 (2009) (quoting INS v. Cardoza-Fonseca, 480 U.S. 421, 442–43 (1987)). Thus, the legislature did not intend, through article XIV, section 5, that any "trust" principles be incorporated into the Constitution.

As previously explained in the State's brief, less than a year after the effective date of article XIV, section 5, the General Assembly confirmed the distinction between the public trust doctrine and this constitutional provision by enacting a statute that separately recognized (1) "[a]reas" subject to "public trust rights" and (2) "areas" that may fall under the State's "authori[ty] . . . under Article XIV, Section 5 of the North Carolina Constitution." N.C. Gen. Stat. § 113A-113(b)(5); State's Br. 19. The plaintiffs made no attempt to explain this deliberate distinction and instead ignored it entirely.

In 1985, the General Assembly pronounced, by statute, that public trust rights are established by common law, and are not constitutionally based. Specifically, the General

[2] The State requests that the Court take judicial notice of this bill. See, e.g., Territory of Alaska v. Am. Can Co., 358 U.S. 224, 227 (1959) (taking judicial notice of unenacted bill to observe that certain language from bill was not incorporated into the enacted act). A copy of the bill is attached as Exhibit 1 to this brief. Counsel represents that this bill was provided by the staff of the North Carolina Legislative Library in the ordinary course of business.

[3] The reference to a "trust" may stem, at least in part, from the bill's author's familiarity with the public trust doctrine. See Kacy Manahan, "Comment: The Constitutional Public Trust Doctrine," 49 Envtl. L. 263, 296 n.251 (2019) (identifying Professor Schoenbaum as the "principal drafter" of article XIV, section 5); Thomas J. Schoenbaum, "Public Rights and Coastal Zone Management," 51 N.C. L. Rev. 1, 16–18 (1972) (discussing "the public trust doctrine").

Assembly pronounced that "'public trust rights' means those rights held in trust by the State for the use and benefit of the people of the State in common. They are established by common law as interpreted by the courts of this State." N.C. Gen. Stat. § 1-45.1.

The coup de grâce came in 1995, when the North Carolina Supreme Court concluded that "[t]he public trust doctrine is a common law doctrine" and there is an "absence of a constitutional basis for the public trust doctrine." Gwathmey, 342 N.C. at 304, 464 S.E.2d at 684; see also Town of Nags Head v. Cherry, Inc., 219 N.C. App. 66, 72, 723 S.E.2d 156, 159 (2012) (recognizing that "public trust rights first developed as a common law doctrine" but have since "been recognized in our General Statutes," with no mention of the Constitution).

Against this significant and consistent evidence, the plaintiffs begin their defense of the alleged constitutionalization of the public trust doctrine with the title of the act that enacted article XIV, section 5. Pls.' Br. 20. But, like the "trust" language that the General Assembly rejected, the title of the act appears nowhere in the Constitution. Even if it did, it never mentions the public trust doctrine, its principles, or even the word "trust."

The plaintiffs move on to cite John L. Sanders' recollection regarding the informal moniker of the bill. Id. To the State's knowledge, the courts have never used an act's "street name" as an interpretive tool. Nevertheless, Mr. Sanders is a constitutional scholar to whom our state courts have, on a number of occasions, referred for guidance. E.g., Town of Boone v. State, 369 N.C. 126, 147, 794 S.E.2d 710, 725 (2016). Here is how Mr. Sanders described article XIV, section 5 about two months after it was passed by the legislature:

> In its final form, the amendment declares a public policy of conserving and protecting the natural resources of the state, controlling air and water pollution, and preserving as part of the common heritage of the state "its forests, wetlands, estuaries, beaches, historical sites, openlands, and places of beauty." This declaration may serve as a constitutional basis for future state and local action on these subjects.

John L. Sanders, "Proposed Amendments," Popular Gov't, Sept. 1971, at 14. According to this contemporaneous account, the amendment is only a declaration of policy that provided a constitutional basis for further action. Notably absent from this description is any mention of the public trust doctrine, any mandate to the State, or any enforceable rights of the public.

The plaintiffs next argue that a law student's comment concluded that the drafters of article XIV, section 5 "intended to adopt" the public trust doctrine into the Constitution. Pls.' Br. 20. That is not at all what the student said. She said only that there was "some indication" of this intent. Manahan, supra, at 296. But she based this conclusion solely on the "trust" language discussed above that the General Assembly excised from the bill. Id. at 296 n.251. In fact, the student also concluded that the North Carolina "courts have not connected the traditional navigation-based [public trust doctrine] with," what she called, "the trust language of North Carolina's constitution." Id. at 296.

The plaintiffs also cannot overcome the plain statements from the North Carolina Supreme Court that "[t]he public trust doctrine is a common law doctrine" that has no "constitutional basis." Gwathmey, 342 N.C. at 304, 464 S.E.2d at 684. In Gwathmey, the Court confronted the issue of whether the public trust doctrine placed any enforceable limit on the General Assembly's right to convey the State's submerged lands. The Court recognized that the Constitution could restrict the General Assembly, but held that the public trust doctrine could not limit the legislature's authority because it is not a constitutional doctrine. The Court's determination that the public trust doctrine lacks any constitutional basis was indispensable to its interpretation of the doctrine.

In opposition to Gwathmey, the plaintiffs cite three cases, Pls.' Br. 21, none of which undermine the Supreme Court's statement of the law. The case of State ex rel. Rohrer v. Credle, 322 N.C. 522, 527, 369 S.E.2d 825, 828 (1988), involved an issue very similar to that in

Gwathmey—quieting title as between a citizen and the State. Credle clearly turned primarily on the citizen's failure to produce a connected chain of title. The Court also noted that "the public trust doctrine" and statutory law—but not the Constitution—"also weigh against" the citizen's claim to a prescriptive property right on public trust lands. Credle, 322 N.C. at 534, 369 S.E.2d at 832. Although the Court stated that the "constitution mandates the conservation and protection of public lands and waters for the benefit of the public," it never related that principle to the issue in the case. Id. at 532, 369 S.E.2d at 831.

Gwathmey, on the other hand, discussed the interplay between the common law, including the public trust doctrine, and the Constitution at some length. Gwathmey even discussed various aspects of Credle. Gwathmey, 342 N.C. at 302–03, 464 S.E.2d at 683. It is inconceivable that when the Court concluded that there is an "absence of a constitutional basis for the public trust doctrine" it simply overlooked article XIV, section 5. Thus, the plaintiffs' observation that Gwathmey does not cite specifically to article XIV, section 5 is not persuasive. Pls.' Br. 19. And even if the Supreme Court's specific application of the public trust doctrine in Gwathmey was narrow, see id. at 17, 19, its discussion of the lack of a constitutional basis for the doctrine was not.

The plaintiffs next rely on two Court of Appeals cases. They cite Parker v. New Hanover County, 173 N.C. App. 644, 654, 619 S.E.2d 868, 875–76 (2005), for the proposition that article XIV, section 5 "recognize[s] the key role of the State and its political subdivisions, including counties, in preserving beaches, in ensuring the navigability and quality of waters." Pls.' Br. 21. But the plaintiffs omitted important language from that sentence. The Court said: "[O]ur constitution, the public trust doctrine, and the State's public policy and legislation have long recognized the key role . . . ." Thus, the Court was recognizing that "[o]ur constitution" and "the public trust doctrine" are separate sources of law. Regardless, the fact that article XIV, section 5

recognizes the State's "key role" in preserving natural resources does not suggest that it constitutionalized the public trust doctrine.

Finally, the plaintiffs attempt to conjure support from Town of Nags Head v. Richardson, 260 N.C. App. 325, 817 S.E.2d 874 (2018). In discussing background principles, the Court of Appeals, citing article XIV, section 5, opined that "[t]he State is tasked with protecting [public trust] rights pursuant to the North Carolina Constitution." Id. at 334, 817 S.E.2d at 883. However, Richardson was a local government eminent domain action that did not involve the State at all. Moreover, the court held that the town waived, disavowed and was estopped from raising any argument under the public trust doctrine. Thus, the court's passing statement is textbook *dictum*. Compare id. with N.C. State Bar v. DuMont, 304 N.C. 627, 638, 286 S.E.2d 89, 96 (1982) (stating, similarly in *dictum*, that article XIV, section 5 "added to the Constitution a statement of policy regarding conservation and the protection of natural resources"). For these reasons, the plaintiffs cannot sustain the argument that article XIV, section 5 constitutionalized the public trust doctrine.

Regarding article I, section 38, the plaintiffs do not seem to mount much of an argument that it actually incorporates the public trust doctrine. Perhaps their only argument is that "preserve" means "to keep safe from injury, harm, or destruction" and therefore "it follows" that the State has a "'duty' to keep our public trust resources 'safe from injury, harm or destruction." Pls.' Br 24–25. However, the Constitution "preserves" only the "right" to "fish." The provision separately states that the General Assembly may restrict the right to fish in order to "promote wildlife conservation," but it nowhere mandates that the General Assembly exercise its police power to "promote wildlife conservation." That is, it does not create the alleged duty that is central to the plaintiffs' claim. The remainder of the plaintiffs' discussion of article I, section 38 does not address whether the provision incorporated the public trust doctrine, but instead whether

the provision, by its own terms, sets up a duty for the State. This latter argument is refuted in section III.A, infra.[4]

Accordingly, the plain language, history, and legislative and judicial interpretation of the Constitution show that the public trust doctrine has never been adopted or incorporated into the Constitution.

B. Even if the public trust doctrine had been constitutionalized, the plaintiffs cannot construct a cause of action from their patchwork of inapplicable authorities.

Stitching together bits and pieces from a number of sources, including federal decisions, out-of-state cases, and secondary sources, the plaintiffs paint a false narrative of how the public trust doctrine operates under North Carolina law. The State—citing only North Carolina case law—previously laid out certain general parameters of the public trust doctrine as applied by our state courts:

- The State owns certain lands associated with certain water bodies and public trust rights (e.g., fishing and recreation) attach to these lands.
- There is a rebuttable presumption that if the State were to alienate public trust lands, it intended to reserve public trust rights. But this presumption does not bar the State from conveying public trust lands without reserving public trust rights.
- No member of the public can unreasonably exclude others from public trust lands and waters.
- The State may use its police powers to protect the public's trust rights.

State's Br. 8–10.

[4] The plaintiffs observe that Gwathmey was decided long before article I, section 38 was incorporated into the Constitution. Pls.' Br. 19. This is true, but irrelevant. The State never contended that Gwathmey said anything about article I, section 38. See State's Br. 19 (noting Gwathmey's "absence of a constitutional basis" language regarding article XIV, section 5).

To weave together their version of the public trust doctrine, the plaintiffs start not with North Carolina case law, but primarily with U.S. Supreme Court case law. They next contend that North Carolina has "adopted" the declaration from the U.S. Supreme Court that "[t]he State's management of public trust resources must not result in 'substantial impairment of the interest of the public in the waters.'" Pls.' Br. 16 (quoting Ill. Central R.R. Co. v. Illinois, 146 U.S. 387, 435 (1892)). Finally, the plaintiffs argue that the term "public trust resources" includes "coastal fisheries," which completes their position that the State's management of "coastal fisheries" is subject to "fundamental restraints" under the public trust doctrine, which presumably refers to the "substantial impairment" standard from Illinois Central. Pls.' Br. 16–17; see also Compl. ¶¶ 81, 98 n.9, 141, 281, 306 (referring to the "substantial impairment" standard). This argument is flawed from start to finish.

First, even the U.S. Supreme Court has unequivocally recognized that its pronouncements on the contours of the public trust doctrine do not control state law. E.g., PPL Mont., LLC v. Montana, 565 U.S. 576, 603 (2012) ("[T]he public trust doctrine remains a matter of state law."); Phillips Petroleum Co. v. Mississippi, 484 U.S. 469, 475 (1988) ("[T]he individual States have the authority to define the limits of the lands held in public trust and to recognize private rights in such lands as they see fit."). Thus, Illinois Central and other U.S. Supreme Court law are not, on their own, the law in this state.

Second, our state courts have not adopted relevant U.S. Supreme Court pronouncements. In Shepard's Point Land Co. v. Atl. Hotel, 132 N.C. 517, 525, 44 S.E. 39, 41 (1903), the North Carolina Supreme Court quoted the "substantial impairment" standard from Illinois Central. Nearly a century later, the State argued that the public trust doctrine forbade the General Assembly from taking action respecting certain public trust lands unless it complied with the "substantial impairment" standard quoted in Shepard's Point. The North Carolina Supreme Court

rejected this argument, concluding that its reference in Shepard's Point to the Illinois Central standard was "*obiter dictum*" and "not controlling." Gwathmey, 342 N.C. at 303, 464 S.E.2d at 683. Thus, given the opportunity to adopt the U.S. Supreme Court's (and the plaintiffs') interpretation of the public trust doctrine, North Carolina's Supreme Court pointedly refused.

Finally, the plaintiffs improperly muddy the scope of the term "public trust resources." They contend that the case law shows that "[t]he State's management of public trust resources must not result in substantial impairment" of the public's interests. Pls.' Br. 16 (cleaned up; emphasis added). However, no law supports that fish, fisheries or fish stocks are such "public trust resources" for the purposes of the public trust doctrine, and the plaintiffs are incorrect that the State "concede[d]" anything to the contrary. Pls.' Br. 16–17.

None of the cases that the plaintiffs cite for their broad understanding of the phrase "public trust resources" as that term relates to the public trust doctrine actually used that term. For example, in Credle, the North Carolina Supreme Court did not say that "the State's management of public trust resources must not result in 'substantial impairment of the interest of the public in the waters." Pls.' Br. 16 (quotation marks removed; emphasis added). It said that "[u]nder the public trust doctrine, each state could regulate or dispose of its tidal lands, provided that it could be done 'without substantial impairment of the interest of the public in the waters.'" Credle, 322 N.C. at 526, 369 S.E.2d at 827 (quoting Illinois Central, 146 U.S. at 435) (emphasis added). And the Court of Appeals in State v. Forehand, 67 N.C. App. 148, 312 S.E.2d 247 (1984), merely said that the State had "accepted the public trust doctrine as set forth in Illinois Central." But in the next sentence, it clarified what it meant, i.e., that "the State holds title to the submerged lands under navigable waters '. . . . in trust for the people of the state so that they may navigate, fish, and carry on commerce in the waters involved.'" Forehand, 67 N.C. App. at 150–51, 312 S.E.2d at 249 (quoting Schoenbaum, supra, at 17) (emphasis added). The resources that

these cases, and other cases on which the plaintiffs rely, discussed are lands associated with certain waters and not, as the plaintiffs suggest, "coastal fisheries." Pls.' Br. 16.

The State is aware of only two cases that use the term "public trust resource." Both are public trust doctrine cases, and both rely on the following statutory definition: "'public trust resources' means land and water areas, both public and private, subject to public trust rights as that term is defined in G.S. 1-45.1." Nies, 244 N.C. App. at 89, 780 S.E.2d at 194 (quoting N.C. Gen. Stat. § 113-131(e)) (italics removed); Town of Nags Head v. Cherry, Inc., 219 N.C. App. 66, 73, 723 S.E.2d 156, 160 (2012) (quoting same statute); see also N.C. Gen. Stat. § 113A-134.2 (using same definition). This definition, like the cases on which the plaintiffs rely, is consistent with the public trust doctrine, a prime aspect of which is to identify the areas in which individuals can exercise their public trust rights, i.e., navigable waters and certain associated upland areas.

There are many public resources that are managed by the State for the benefit of the people—groundwater, parks, wild game, air, etc. Despite these being resources held in trust for the public, they are not governed by the public trust doctrine because the public trust doctrine is limited to navigable waters and certain associated lands. Thus, the plaintiffs' suggestion that any public resource that is managed for the people's benefit is a "public trust resource" as that phrase is used with relation to the public trust doctrine is inconsistent with statute, case law and the public trust doctrine itself.

In further support of their argument, the plaintiffs make dubious use of precedent. For example, the plaintiffs cite Geer v. Connecticut, 161 U.S. 519 (1896), for the proposition that the State has a duty to manage wildlife resources in a particular manner. Pls.' Br. 12. However, they fail to mention that the U.S. Supreme Court overruled Geer over forty years ago. Hughes v. Oklahoma, 441 U.S. 322, 325 (1979) ("Geer . . . is overruled."). Even if it had not been

overruled, the language on which the plaintiffs rely about the "duty" of the state was a stray remark in a lengthy quotation from an Illinois Supreme Court case and had no bearing on the issues in Geer. Moreover, even the Illinois Supreme Court opined that it was only "perhaps[ ] accurate" that such an "impl[ied]" "duty" existed—significant qualifiers that the plaintiffs also omit. Geer, 161 U.S. at 534 (quoting Magner v. Illinois, 97 Ill. 320, 334 (1881)). Whatever "duty" might "perhaps" have been "impl[ied]" in Illinois law in 1881 is irrelevant to the issues before the Court in this case.

The plaintiffs also rely on State v. West, 31 N.C. App. 431, 229 S.E.2d 826 (1976), aff'd, 293 N.C. 18, 235 S.E.2d 150 (1977), for the alleged principle that the State has an "obligation" to "manage in trust coastal oysters." Pls.' Br. 16. However, the West case was about pre-Revolutionary War-era documents and had nothing to do with oysters or any natural resources. To be sure, the Court of Appeals made a broad comment about "property owned by the government [that] is held in trust for the people." West, 31 N.C. App. at 441, 229 S.E.2d at 832. But when the Supreme Court later affirmed the Court of Appeals' judgment, it never mentioned such trust, fully negating any value in the Court of Appeals' "trust" comment.[5]

Finally, the plaintiffs attempt to marginalize the State's position by asserting—repeatedly and inaccurately—that the State relied "almost exclusively" on the Gwathmey opinion. Pls.' Br. 17, 19. But see, e.g., State's Br. 8–9 (identifying Gwathmey as one "example" along with well over a dozen other cases and statutes). In fact, the plaintiffs spend far more time trying to

[5] The precedential value of the Juliana opinion, see Pls.'s Br. 13 n.4, 15 n.5, is also questionable. A federal appeals court held that the Juliana plaintiffs lacked standing under article III of the U.S. Constitution. Juliana v. United States, 947 F.3d 1159, 1164 (9th Cir. 2020). Thus, the trial court did not have subject matter jurisdiction when it issued the opinion on which the plaintiffs rely.

distance themselves from Gwathmey than the State did discussing it. The Court should reject the plaintiffs' attempt to dismiss controlling precedent.

The plaintiffs start by seeking to denigrate the State's actions in Gwathmey by claiming—four times—that the State "reneged" in Gwathmey and also that the facts of Gwathmey were "unique" and "egregious." Pls.' Br. 17. Neither Gwathmey nor any other court has ever characterized the case that way. In Gwathmey, the State granted certain lands to private citizens but later asserted that the titles were impressed with public trust rights. The Court conceded that the applicable law was "complex and at times conflicting" and it had to expressly disavow and clarify language from several prior cases—including Credle—in order to clean up the law. Thus, the State in Gwathmey relied on a fair reading of "complex and . . . conflicting" case law, and did not, as the plaintiffs imply, act in bad faith.

Regardless, the plaintiffs' alleged "fundamental[ ]" problem with Gwathmey is a strawman argument. The plaintiffs contend that Gwathmey does not stand for a "sweeping proposition" about the State's discretion to allow the "excessive exploitation of public trust resources." Pls.' Br. 18. The State never argued that Gwathmey stood for any such proposition. From Gwathmey, the State argued only that (1) the public trust doctrine is not constitutionally grounded, State's Br. 19, and (2) the public trust doctrine creates a presumption that applies when the State conveys public trust lands, id. at 8–9.

For all of these reasons, even if the public trust doctrine had been constitutionalized, the Complaint still fails to state a claim. In short, the doctrine in North Carolina creates no duty that the State manage fisheries according to the "substantial impairment" standard.[6]

[6] In its opening brief, the State argued that only it had the authority to enforce the public's rights under the public trust doctrine. State's Br. 10–12. The plaintiffs disagree, primarily on the strength of the contention that citizens may invoke the authority of the courts to vindicate their constitutional rights. Pls.' Br. 29. The State's argument on this issue was premised on the

III. REGARDLESS OF THE PUBLIC TRUST DOCTRINE, THE CONSTITUTION STILL DOES NOT OBLIGATE THE STATE TO REGULATE COMMERCIAL FISHING AS THE PLAINTIFFS PREFER.

The plaintiffs cite two constitutional provisions in support of their claim. They allege that these two provisions provide a basis for relief by incorporating the public trust doctrine. The State also shows here that neither of these two constitutional provisions, on its own and without any adoption of the public trust doctrine, supports any claim against the State.

A. Article I, section 38 protects the public's right to engage in the act of fishing from encroachment by the State, but does not create any affirmative duty for the State regarding resource conservation.

As the plaintiffs correctly observe, "the words used in constitutional provisions are interpreted according to their plain meaning." Pls' Br. 24 (citing Town of Boone v. State, 369 N.C. 126, 132, 794 S.E.2d 710, 715 (2016)). The plaintiffs argue that their claim is supported by the plain language of article I, section 38. This reads far too much into that provision.

Article I, section 38 states:

> The right of the people to hunt, fish, and harvest wildlife is a valued part of the State's heritage and shall be forever preserved for the public good. The people have a right, including the right to use traditional methods, to hunt, fish, and harvest wildlife, subject only to laws enacted by the General Assembly and rules adopted pursuant to authority granted by the General Assembly to (i) promote wildlife conservation and management and (ii) preserve the future of hunting and fishing. Public hunting and fishing shall be a preferred means of managing and controlling wildlife. Nothing herein shall be construed to modify any provision of law relating to trespass, property rights, or eminent domain.

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common law incarnation of the public trust doctrine, and not on the plaintiffs' theory that the doctrine had been constitutionalized. As the State previously recognized, "one whose state constitutional rights have been abridged has a direct claim against the State under our Constitution." State's Br. 15 (quoting Corum, 330 N.C. at 782, 413 S.E.2d at 289 (emphasis removed)). The State contends that the plaintiffs have no relevant constitutional rights to enforce. To be clear, the State also disagrees with the plaintiffs' interpretation of relevant case law regarding the enforcement of the common law public trust doctrine. See Pls.' Br. 27–28. Because the plaintiffs have clarified the nature of their alleged cause of action, there is no need for the Court to resolve that issue.

As explained in the State's brief, it is clear from the language used that this provision restricts State government regulation of the acts of hunting, fishing, and wildlife harvesting, but does not create affirmative duties to manage "public trust resources" in a particular manner, much less guarantee the right to particular fish stocks. State's Br. 15–17.

The second sentence is particularly instructive as to the purpose of this provision. It states that "[t]he people have a right, including the right to use traditional methods, to hunt, fish, and harvest wildlife, subject only to laws enacted by the General Assembly . . . to (i) promote wildlife conservation and management and (ii) preserve the future of hunting and fishing." Id. (emphasis added). The qualifier regarding "traditional methods" confirms that the phrase that is qualified—the "right"—is something that is accomplished at least in part through "traditional methods"—i.e., the acts of hunting, fishing and harvesting wildlife. The provision recognizes that the "General Assembly" may "enact[ ]" certain types of "laws" to which those rights are "subject." These laws may address "wildlife conservation and management," but nothing suggests that the State must enact any such laws. Thus, the State is restricted from regulating the acts of hunting, fishing, and harvesting wildlife, except under certain circumstances such as for wildlife conservation. Even liberally construed, there is no language contained within this provision supporting the plaintiffs' claim they have a constitutional right to a different regulatory regime regarding certain fish stocks.

The plaintiffs isolate the portion of this provision that states "shall be forever preserved" and claim that this requires the State to "forever preserve[ ]" "public trust resources." Pls' Br. 24–25. However, from reading the provision in context, it is clear that the phrase "forever preserved" is referring to the "right of the people," i.e., the acts or methods of hunting, fishing, and wildlife harvesting, not to any "public trust resources" themselves. In other words, the act or

methods of hunting, fishing, and harvesting wildlife are constitutionally protected, thereby restricting the State's ability to regulate such acts and methods.

The plaintiffs take issue with the State's argument that this provision in the Constitution only provides a limitation on the State and does not create an affirmative duty. However, the plaintiffs fail to cite to any case law in which this State's courts have determined that a right under article I requires affirmative action from the State. As the plaintiffs themselves noted, Pls.' Br. 25, the North Carolina Supreme Court has stated that the purpose of the declaration of rights "was to provide citizens with protection from the State's encroachment upon those rights." Corum, 330 N.C. at 782–83, 413 S.E.2d at 289–90 (emphasis added and citations omitted). Thus, the purpose of the declaration of rights was to provide citizens with protection "from the State" not to obligate the State to protect certain citizens from third parties such as the commercial fishing industry. Id.

The only case of which the State is aware in which a right listed under article I was determined to require affirmative steps by the State concerns the right to education. See Leandro v. State, 346 N.C. 336, 347, 488 S.E.2d 249, 255 (1997). But even the Court of Appeals later noted that in "not restrict[ing] state government, but rather commit[ting] it to an affirmative duty," the constitutional right to education is "[u]nlike other declarations of rights." N.C. State Bd. of Educ. v. State, 255 N.C. App. 514, 519, 805 S.E.2d 518, 521 (2017), aff'd by 371 N.C. 149, 814 S.E.2d 54 (2018) (citing John V. Orth, The North Carolina State Constitution, 52 (1st ed. 1993)). The constitutional provisions at issue here are a far cry from those providing a right to education.

With regard to education, article I, section 15 of the Constitution states: "The people have a right to the privilege of education, and it is the duty of the State to guard and maintain that right." (Emphasis added) Separately, the Constitution further provides: "The General Assembly

shall provide by taxation and otherwise for a general and uniform system of free public schools, which shall be maintained at least nine months in every year, and wherein equal opportunities shall be provided for all students. N.C. Const. art. IX, § 2(1) (emphasis added). Thus, with regard to the right to education, the Constitution clearly sets forth a "duty" and the mandatory means to carry out that duty. The Supreme Court has held that these two clauses regarding education guarantee every child of this state an opportunity to receive a sound basic education. Leandro, 346 N.C. at 347, 448 S.E.2d at 255. There is no language providing guarantees to particular hunting or fishing opportunities within the language of either article I, section 38 or, as explained below, article XIV, section 5. The right-to-hunt-and-fish provision does not direct the State to maintain its marine fisheries resources in any particular way. Instead, as discussed previously, it only places limits on the State's regulation of the practices of hunting and fishing. Therefore, article I, section 38 of the Constitution does not provide a basis for the relief the plaintiffs seek.

B. Article XIV, section 5 sets forth only a policy of conservation, but does not create a self-executing mandate.

The State previously showed that the relevant language in article XIV, section 5 does nothing more than establish a state policy regarding conservation. State's Br. 17–19. The plaintiffs do little to counter this other than highlighting the word "shall" in text of the amendment. Pls.' Br. 21. But the presence of the word "shall" does not *ipso facto* establish a mandate. On its face, the phrase on which the plaintiffs rely—"it shall be a proper function of the State and its political subdivisions to . . . ."—is evidence enough that it does not create a mandate.

Beyond that, the plaintiffs rely on a trio of cases to contend that article XIV, section 5 "mandates" and "tasks" the State with certain duties. Pls.' Br. 21. All of these cases have been

addressed previously, and none provide any support for a constitutional mandate. See pp. 11-12, supra.

Possibly the most difficult hurdle for the plaintiffs is not what article XIV, section 5 says, but what it does not say. In its original draft form, article XIV, section 5 arguably included the type of mandatory language that the plaintiffs would prefer. The initial bill read, in part: "The General Assembly in implementing this policy shall include adequate provision for . . . the protection of . . . estuarine areas . . . ." S. 96, 1st ed., Gen. Assemb. (Feb. 2, 1971). But even if the reference to what the "General Assembly . . . shall" do would have created a mandate, this entire sentence was dropped before the amendment was ratified and was never replaced with any equivalent. McCracken & Amick, Inc., 201 N.C. App. at 489, 687 S.E.2d at 696 (recognizing that the legislature does not intend to enact language that it has previously discarded).

In the end, article XIV, section 5 does exactly what it says it does. It establishes a State "policy" and defines a "proper function" of the State. It was accompanied in the early 1970s by an "outpouring of the most far-reaching environmental program ever proposed in North Carolina" which was nearly entirely enacted in statute.[7] And it has been cited to demonstrate that when the government engages in conservation efforts, its actions are constitutionally justified. Parker, 173 N.C. App. at 653–54, 619 S.E.2d at 875–76.

The plaintiffs fail to state a claim under article XIV, section 5 for another reason: the provision is not self-executing. The State previously showed that the type of broad and permissive language in article XIV, section 5—that it states only a broad "policy" and "proper

[7] Milton S. Heath Jr. & Alex L. Hess III, "The Governors' Leadership Role in Developing Modern North Carolina Environmental Law: 1967-1983," 84 N.C. L. Rev. 2031, 2045 (2006).

function" of the State—requires legislative and executive action for implementation. State's Br. 19–20. The plaintiffs never disputed this. In fact, they completely ignored it.

A self-executing provision of a constitution requires no legislative action for implementation. N.C. Sch. Bds. Ass'n v. Moore, 359 N.C. 474, 512, 614 S.E.2d 504, 527 (2005). "Prohibitory provisions in a Constitution are usually self-executing to the extent that anything done in violation of them is void." Kitchin v. Wood, 154 N.C. 565, 568, 70 S.E. 995, 996 (1911). Affirmative provisions may or may not be self-executing. E.g., Cunningham v. Sprinkle, 124 N.C. 638, 642, 33 S.E. 138, 139 (1899) (holding that a directive to the General Assembly to establish a specific new department was "mandatory" but "not self-executing"). The purpose of an affirmative self-executing provision is to remove from the legislature the discretion to not act. Kitchin, 154 N.C. at 567–68, 70 S.E. at 996.

In this context, the North Carolina Supreme Court has indicated that it has a "duty . . . to declare null and void any act of the Legislature that may be in violation of the Constitution," but it "must concede to that coordinate branch of government absolute freedom of discretion in the lawful exercise of its constitutional prerogatives." Cunningham, 124 N.C. at 642, 33 S.E. at 139. Thus, where a constitutional provision is "permissive in terms and not self-executing," an individual has no remedy under that provision if the State chooses not to act. Nash v. Bd. of Comm'rs, 211 N.C. 301, 304, 190 S.E. 475, 477 (1937); see also Person v. Bd. of State Tax Comm'rs, 184 N.C. 499, 504, 115 S.E. 336, 340 (1922) (holding that the plaintiff would "be without remedy" if the legislature's "act should be stricken out" because the constitutional provision in question was "not self-executing").

It is important to understand that the plaintiffs are not suing under any act of the General Assembly or seeking to have any statute declared unconstitutional as being contrary to article

XIV, section 5. They are instead seeking to enforce article XIV, section 5 directly by forcing the State to act affirmatively.

Had it been intended that article XIV, section 5 create the sort of self-executing right that the plaintiffs seem to desire, and even create a mandatory duty to remove from the legislature the option to not act, that could have been so stated in the Constitution. As discussed above, see p 23, supra, the drafters actually removed a provision from article XIV, section 5 that would have at least arguably made legislative action mandatory (but still would not have made the provision self-executing). Therefore, it is clear that there was no intent to make article XIV, section 5 self-executing, or even to create an affirmative duty that could be judicially enforced.[8]

[8] The State also previously made a distinct separation of powers argument, but that position was directed toward judicial enforcement of the common law public trust doctrine, not the Constitution. E.g., State's Br. 13 (arguing that the separation of powers doctrine was implicated because the court would be "announc[ing] a common law principle" that "take[s] direct aim at the other branches of government"). Because the plaintiffs have clarified that their alleged cause of action arises solely under the Constitution, the parties' separation of powers arguments need not be resolved. The State reserves its right to assert the separation of powers at a later time, if necessary, regarding the plaintiffs' Constitution-based claim.

Nevertheless, the State disputes the plaintiffs' contention that they are merely asking the Court to "enjoin future violations," Pls.' Br. 31, and are not seeking intrusive relief. The plaintiffs have only identified in the vaguest of terms how to assess whether the State is violating the law. Because their standard is so malleable, the courts would need to continually revisit this issue to define its contours, and in doing so would essentially govern the resource. There is nothing "routine" about this. See id. In the cases cited by the plaintiffs to support the supposed "routine" nature of the relief they are seeking, id. at 31 n.14, the courts simply declared state laws to be unconstitutional and enjoined the State from enforcing those laws. Enjoining the State from enforcing specific laws is a far cry from ordering it to take affirmative steps to meet an ill-defined standard.

CONCLUSION

For all of the foregoing reasons, the Court should dismiss the Complaint in its entirety.

Respectfully submitted, this, the 27th day of May 2021.

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CERTIFICATE OF SERVICE

I hereby certify that I have this date served a copy of the foregoing Defendant's Reply in Support of Motion to Dismiss upon all parties and/or counsel by electronic mail addressed as follows:

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This the 27th day of May 2021.

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EXHIBIT 1

to the State of North Carolina's Reply in Support of Motion to Dismiss

S. 96, 1st ed., Gen. Assemb. (Feb. 2, 1971)